No. 15-274

In the Supreme Court of the United States

WHOLE WOMAN'S HEALTH, ET AL., PETITIONERS

v.

KIRK COLE, M.D., ET AL., RESPONDENTS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF THE STATE OF WISCONSIN AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

BRAD D. SCHIMEL
Attorney General

WISCONSIN DEPARTMENT
OF JUSTICE
17 West Main Street
Madison, WI 53703
tseytlinm@doj.state.wi.us
(608) 267-9323

MISHA TSEYTLIN
Solicitor General
**Counsel of Record*

DANIEL P. LENNINGTON
LUKE N. BERG
Deputy Solicitors
General

Attorneys for *Amicus Curiae*

QUESTION PRESENTED

The State of Wisconsin will address the following question:

Does a challenge to a regulation of abortion doctors under the Due Process Clause fall within the "very limited and well-defined class of cases," *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 377 n.6 (1991), in which inquiry into the legislature's subjective motives is permissible?

TABLE OF CONTENTS

Page

Question Presented i

Interest of *Amicus Curiae* 1

Summary of Argument 3

Argument 7

I. As Wisconsin's Experience Before The Seventh Circuit Demonstrates, Inquiry Into Subjective Legislative Motives For Regulating Abortion Doctors Is Deeply Problematic 7

II. Analyzing Subjective Legislative Motives For Regulating Abortion Doctors Serves No Constitutional Values 14

A. The "Very Limited And Well-Defined" Exception Permitting Inquiry Into Legislative Motives Does Not Apply To Regulations Of Abortion Doctors 14

B. This Court's Caselaw Protects Access To Abortion Without Inquiry Into Legislative Motives .. 16

Conclusion 22

TABLE OF AUTHORITIES

Cases

Armstrong v. Mazurek,
94 F.3d 566 (9th Cir. 1996) 14

Ayotte v. Planned Parenthood of N. New England,
546 U.S. 320 (2006) 21

Barsky v. Bd. of Regents of Univ. of N.Y.,
347 U.S. 442 (1954) 18, 21

Church of the Lakumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993) 15, 16

City of Arlington Heights v. Metro. Hous. Dev. Corp.,
429 U.S. 252 (1977) 15, 16

City of Columbia v. Omni Outdoor Advert., Inc.,
499 U.S. 365 (1991) 4, 6, 15

Crawford v. Marion Cty. Election Bd.,
553 U.S. 181 (2008) 4, 16

Fletcher v. Peck,
10 U.S. 87 (1810) 3

Gonzales v. Carhart,
550 U.S. 124 (2007) .....*passim*

Greenville Women's Clinic v. Comm'r, S.C. Dep't of Health & Envtl. Control,
317 F.3d 357 (4th Cir. 2002) 21

Heller v. Doe,
509 U.S. 312 (1993) 17

Hope Clinic v. Ryan,
195 F.3d 857 (7th Cir. 1999) .....*passim*

Hunt v. Cromartie,
526 U.S. 541 (1999) 15

Jackson Women's Health Org. v. Currier,
760 F.3d 448 (5th Cir. 2014) 4, 20

Mazurek v. Armstrong,
520 U.S. 968 (1997) 4, 17, 19

McCray v. United States,
195 U.S. 27 (1904) 5, 7, 12

New York v. Roberts,
171 U.S. 658 (1898) 20

Palmer v. Thompson,
403 U.S. 217 (1971) 5, 7

Planned Parenthood of Cent. Mo. v. Danforth,
428 U.S. 52 (1976) 18

Planned Parenthood of Se. Penn. v. Casey,
505 U.S. 833 (1992) 7, 16, 18, 19

Planned Parenthood of Wis. Inc., v. Van Hollen,
94 F. Supp. 3d 949 (W.D. Wis. 2015)..... 10

Planned Parenthood of Wis., Inc. v. Schimel,
806 F.3d 908 (7th Cir. 2015) .....*passim*

Planned Parenthood of Wis., Inc. v. Schimel,
No. 13-cv-465 (W.D. Wis. Mar. 3, 2014) 2

Planned Parenthood of Wis., Inc. v. Van Hollen,
738 F.3d 786 (7th Cir. 2013) 2, 10, 12

Roe v. Wade,
410 U.S. 113 (1973) 18

Stenberg v. Carhart,
530 U.S. 914 (2000) .....*passim*

Thornburgh v. Am. Col. of Obstetricians & Gynecologists,
476 U.S. 747 (1986) 14

United States v. Lovett,
328 U.S. 303 (1946) 15

United States v. O'Brien,
391 U.S. 367 (1968) 4, 7

Washington v. Glucksberg,
521 U.S. 702 (1997) 18, 21

Weinberger v. Wiesenfeld,
420 U.S. 636 (1975) 15

Whole Woman's Health v. Cole,
790 F.3d 563 (5th Cir. 2015) 21

Williamson v. Lee Optical of Okla. Co.,
348 U.S. 483 (1955) 18, 21

Statutes

U.S. Const. amend. XIV, § 1 15

Other Authorities

1 Joel Prentiss Bishop, *Commentaries on the Law of Statutory Crimes* (1873) 7

2 Joseph Story, *Commentaries on the Constitution of the United States* (1833) 7

Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* (1868) 3

INTEREST OF *AMICUS CURIAE*

In early 2013, the national media reported heinous crimes committed by the Philadelphia abortionist Kermit Gosnell.[1] As revealed by a grand-jury investigation and later trial, Gosnell "overdosed his patients with dangerous drugs, spread venereal disease among them with infected instruments," allowed untrained staff to perform unsafe medical procedures, and favored an abortion procedure that involved delivering live babies and killing them by "sticking scissors into the back of [each] baby's neck and cutting the spinal cord."[2] Gosnell's clinic was a grotesque scene of jars with severed babies' feet and semi-conscious women in filthy chairs. The public learned that Gosnell was able to commit these atrocities for over *forty years* because of a systematic lack of oversight and accountability.[3] For example, Gosnell, like LeRoy Carhart, was an "abortionist" who "lack[ed] admitting privileges at any hospital." *See Stenberg v. Carhart*, 530 U.S. 914, 958 (2000) (Kennedy, J., dissenting).

---

[1] Conor Friedersdorf, *Why Dr. Kermit Gosnell's Trial Should Be A Front Page Story*, The Atlantic (Apr. 12, 2013), http://www.theatlantic.com/national/archive/2013/04/why-dr-kermit-gosnells-trial-should-be-a-front-page-story/274944/.

[2] Report of the Grand Jury at 1, 4, *In re County Investigating Grand Jury XXIII* (Pa. Ct. Com. Pl. 2011) (Misc. No. 9901-2008), http://www.phila.gov/districtattorney/pdfs/grandjurywomensmedical.pdf (hereafter "Grand Jury Report").

[3] Grand Jury Report at 8–13, 16–17, 137–217, 248–261.

Responding to the ensuing public outcry, Wisconsin, Texas, and several other States enacted laws requiring additional oversight of abortion clinics, including the requirement that abortion doctors have admitting privileges at nearby hospitals. *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 802–03 (7th Cir. 2013) (Manion, J., dissenting). Underlying these new mandates was, among other things, legislative recognition that a doctor of Gosnell's character could never retain admitting privileges at any reputable hospital.[4] The sequence of horrific abortion revelations, followed by widespread legislative responses by the States, is similar to the events that this Court catalogued in explaining the spread of efforts to ban partial-birth abortion. *See Gonzales v. Carhart*, 550 U.S. 124, 140–41 (2007).

Just ten days after this Court granted review in the present case, the Seventh Circuit held that Wisconsin's admitting-privileges law (which is similar to Texas's law at issue in this case) was unconstitutional. *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908 (7th Cir. 2015). Conducting an inquiry into Wisconsin's motives—the same motives-based approach petitioners here urge as their primary argument—the panel described Wisconsin's law as proof that Wisconsin does not "car[e] about poor women" and does not "actually

---

[4] *See Planned Parenthood of Wis., Inc. v. Schimel*, No. 13-cv-465, Dkt. 117-1, ¶ 17 (W.D. Wis. Mar. 3, 2014) (expert report of Dr. James Anderson).

care about health," and asked, "[w]hy did the [legislature] start with abortion, is it because it begins with the letter A?" *See infra* p. 10. These comments are strikingly similar to those directed at Wisconsin after it banned partial-birth abortion. At that time, the Wisconsin legislature was accused of showing "uninformed" "ignorance" and enacting a "craz[y]" law, while not acting in "good faith." *Hope Clinic v. Ryan*, 195 F.3d 857, 879–82 (7th Cir. 1999) (en banc) (Posner, J., dissenting), *vacated by* 530 U.S. 1271 (2000).

Wisconsin thus has an acute interest in petitioners' challenge to Texas's laws regulating abortion doctors. Wisconsin intends to file a Petition for Writ of Certiorari to review the Seventh Circuit's decision invalidating Wisconsin's admitting-privileges law. This Court's decision in the Texas case, including how it addresses petitioners' primary argument that Texas's laws are invalid because of alleged "impermissible purposes," will likely impact the disposition of Wisconsin's forthcoming petition.

SUMMARY OF ARGUMENT

The rule that American courts should refrain from inquiring into legislative motives dates back to Chief Justice John Marshall's decision in *Fletcher v. Peck*, 10 U.S. 87, 130 (1810). *See also* Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 186–87 (1868). As this Court recently explained, if a "law is supported by valid

neutral justifications, those justifications should not be disregarded simply because [other considerations] may have provided one motivation for the votes of individual legislators." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 204 (2008). This Court has recognized an exception "only in the 'very limited and well-defined class of cases where the very nature of the constitutional question requires [this] inquiry,'" such as the Equal Protection Clause's prohibition of invidious discrimination. *See City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 377 n.6 (1991) (quoting *United States v. O'Brien*, 391 U.S. 367, 383 n.30 (1968)).

Petitioners' primary argument on both the merits and in favor of facial invalidation is that the Texas legislature acted with allegedly "impermissible purpose[s]" in enacting its laws. Pet'rs' Br. 35–44, 54. Petitioners' framing of this case presents an opportunity for this Court to settle definitively the question that this Court left open in *Mazurek v. Armstrong*, 520 U.S. 968 (1997) (*per curiam*): whether inquiry into legislative motives for enacting an otherwise lawful regulation of abortion doctors is permissible. *Id.* at 972. Although this Court in *Gonzales* appeared to resolve the question against subjective inquiries into legislative motives, *see Planned Parenthood of Wisconsin, Inc. v. Schimel*, 806 F.3d 908, 930–31 (7th Cir. 2015) (Manion, J., dissenting); *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 460 n.4 (5th Cir. 2014) (Garza, J., dissenting), explicit guidance on this point is

essential to not only the resolution of this case, but also to future litigation.

The motives-based inquiry petitioners urge as their primary argument is deeply problematic and serves no constitutional values. Accordingly, it fails to satisfy this Court's narrow exception to the prohibition against considering legislative motives.

I. Wisconsin's experience before the Seventh Circuit illustrates that permitting inquiry into a legislature's subjective motives for regulating abortion doctors has troubling consequences. This Court has explained that an important reason to avoid motives-based analysis is the threat that such analysis will undermine the respect due to legislative bodies. *See Palmer v. Thompson*, 403 U.S. 217, 224–25 (1971); *McCray v. United States*, 195 U.S. 27, 55 (1904). Over the last two decades, Wisconsin's legislature has enacted a ban on partial-birth abortion and a requirement that abortion doctors have admitting privileges at local hospitals, both in response to horrific public revelations of the actions taken by abortion doctors. Wisconsin's participation in the national trend of enacting these reasonable restrictions has been met with judicial accusations of, among other things, not "caring about poor women," being driven by "uniformed" "ignorance," enacting "craz[y]" laws, and not acting in "good faith." *Hope Clinic*, 195 F.3d at 879–82 (Posner, J., dissenting).

Such judicial comments, directed at a sovereign State, illustrate that in this highly charged area of law, permitting inquiry into legislative motives will inevitably lead to unjustified attacks on legislators and the citizens they represent.

II. These deeply troubling consequences that flow from inquiry into a legislature's subjective motives are unnecessary because such inquiries serve no constitutional values in the abortion-regulation context. This Court has recognized a "very limited" exception to the general rule forbidding inquiry into legislative motives in order to ferret out invidious discrimination against minorities, women, specific individuals, and religions. *Omni Outdoor Advert., Inc.*, 499 U.S. at 377 n.6. This exception does not logically apply to a Due Process Clause challenge to a regulation of abortion doctors because opposition to abortion is not invidious. The "decent and civilized" view that at least some abortions are "so abhorrent as to be among the most serious of crimes against human life," *Stenberg*, 530 U.S. at 979 (Kennedy, J., dissenting), does not raise the same type of constitutional concerns regarding legislators driven by impermissible animus. Instead, this Court's caselaw—which requires that regulations of abortion doctors "rational[y]" forward objectively "legitimate" interests and pose no "substantial obstacle" to abortion access in "discrete and well-defined instances"—honors *Casey*'s "balance" between abortion access and the States' authority to regulate abortion, without intrusive inquiry into legislative

motivations. *See Gonzales*, 550 U.S. at 146, 166–67 (discussing *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833 (1992)).

ARGUMENT

I. As Wisconsin's Experience Before The Seventh Circuit Demonstrates, Inquiry Into Subjective Legislative Motives For Regulating Abortion Doctors Is Deeply Problematic

A. This Court has explained that one of the critical reasons that inquiries into subjective motives are disfavored is because motives are often "difficult or impossible" to properly identify. *See Palmer*, 403 U.S. at 225. After all, "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork." *O'Brien*, 391 U.S. at 384; *accord* 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1086, p. 533 (1833) ("The motives of many of the members may be, nay must be utterly unknown, and incapable of ascertainment by any judicial or other inquiry."). These practical problems raise separation of powers and comity concerns when dealing with legislative bodies because courts owe "confidence and respect" to these bodies. *McCray*, 195 U.S. at 55; 1 Joel Prentiss Bishop, *Commentaries on the Law of Statutory Crimes* § 38, p. 31 (1873) ("The court should never impute evil motives to the legislative body.").

Wisconsin's experience before the Seventh Circuit—where petitioners' motives-based approach to evaluating regulation of abortion doctors has at times found favor—illustrates that these reasons for eschewing inquiry into subjective legislative motives apply with special force in this area of law.

B. Judicial inquiry into Wisconsin's motives for regulating abortion doctors began when the State joined "some 30 other States" in prohibiting partial-birth abortion. *Stenberg*, 530 U.S. at 979 (Kennedy, J., dissenting). In *Hope Clinic v. Ryan*, 195 F.3d 857, the majority upheld Wisconsin's ban against partial-birth abortions. An impassioned dissent disagreed. *Id.* at 876–90 (Posner, C.J., dissenting). The lynchpin of the dissent's reasoning was that Wisconsin had acted with impermissible motives in enacting its ban. The dissent explained that it was "incomprehensible to me why [Wisconsin], *if acting in good faith*, was unwilling to write health exception[s]" into their partial-birth abortion prohibitions. *Id.* at 879 (emphasis added). Wisconsin's statue was, according to the dissent, driven by "uniformed" "ignorance of the medical realities of late-term abortion" and "hostility" to "constitutional rights." *Id.* at 880–81. The dissent emphasized that this "purpose alone" was sufficient to invalidate Wisconsin's law, *id.* at 881, and then referred to the law as "craz[y]," *id.* at 882.

This Court in *Gonzales v. Carhart*, 550 U.S. 124, took a different approach to a ban on partial-birth abortion, explaining that a ban was justified by,

among other things, the objectively "legitimate" interests "in regulating the medical profession" and prohibiting procedures that hue too closely to infanticide. *Id.* at 158; *accord Stenberg*, 530 U.S. at 961 (Kennedy, J., dissenting) ("States also have an interest in forbidding medical procedures which, in the State's reasonable determination, might cause the medical profession or society as a whole to become insensitive, even disdainful, to life, including life in the human fetus."). In contrast, the *Gonzales* dissent singled out for special praise the *Hope Clinic* dissent's analysis of the subjective reasons that motivate bans of partial-birth abortions. *See Gonzales*, 550 U.S. at 191 (Ginsburg, J., dissenting); *accord Stenberg*, 530 U.S. at 952 (Ginsburg, J., concurring) ("[As] Chief Judge Posner commented, the law prohibits the procedure because the state legislators seek to chip away" at abortion rights); *id.* at 946 (Stevens, J., concurring) ("Justice GINSBURG and Judge Posner have, I believe, correctly diagnosed the underlying reason for the enactment of this legislation—a reason that also explains much of the Court's rhetoric.").

Seven years later, after Wisconsin enacted a requirement that abortion doctors must obtain admitting privileges at local hospitals, judicial inquiries into Wisconsin's motives resumed. Taking its lead from the *Gonzales* dissent, rather than from the majority, the Seventh Circuit focused its oral argument questions on what it described as the challengers' "purpose argument." Oral Argument at

32:55, *Van Hollen*, 738 F.3d 786 (No. 13-2726).[5] The court speculated that Wisconsin's legislature does not "actually care[ ] about health," which explains why it would enact such a "goofy" law. *Id.* at 12:30, 13:27. "Why did [the legislature] start with abortion," the court asked, "is it because it begins with the letter A?" *Id.* at 5:20. The court's opinion upholding the district court's preliminary injunction urged the lower court on remand to engage in a "fuller enumeration" of the Wisconsin's subjective motives for requiring doctors to obtain admitting privileges. *Van Hollen*, 738 F.3d at 790–91.

The district court then permanently enjoined Wisconsin's admitting-privileges law. *Planned Parenthood of Wis. Inc., v. Van Hollen*, 94 F. Supp. 3d 949 (W.D. Wis. 2015). In discussing legislative motives, the district court expressed: "I would much prefer to default to a finding that such a discovery [of subjective legislative purpose] is 'impossible,' being highly reticent to presume both for personal and public policy reasons to discern the 'collective intent' of another branch of government." *Id.* at 995. Yet the district court followed the Seventh Circuit's "instruct[ions]" and attempted a legislative purpose analysis, concluding that Wisconsin's legislature was motivated by the "purpose [of] prevent[ing] women from accessing abortion." *Id.*

---

[5] Seventh Circuit oral arguments are generally available at: http://media.ca7.uscourts.gov/.

On appeal, the Seventh Circuit resumed its purposive inquest. At oral argument, the court made clear that it believed that Wisconsin's legislature "do[esn't] care about" poor women. Oral Argument at 8:55, *Schimel*, 806 F.3d 908 (No. 15-1736). The court expanded its motives-based inquiry even further, asking: "Governor [Scott] Walker before he withdrew from the Presidential competition said that he thought abortion should be forbidden even if the mother dies as a result of not having an abortion. Is that kind of official Wisconsin policy?" *Id.* at 52:33.

In its opinion upholding the district court's permanent injunction, the Seventh Circuit concluded that Wisconsin's law "is difficult to explain save as a method of preventing abortions that women have a constitutional right to obtain." *Schimel*, 806 F.3d at 912. The panel majority characterized women as the law's "victims," *id.* at 910, and mocked admitting privileges' credentialing function "as a kind of Good Housekeeping Seal of Approval," *id.* at 915. While the majority seemed to understand that abortion doctors engage in a medical practice of a special character, it did not acknowledge the possibility that this special character itself could justify additional regulations. *Id.* at 917 ("St. Joseph's Community Hospital of West Bend[ ] requires applicants for obstetrics/gynecology admitting privileges to have delivered 100 babies in the previous two years, by which of course they mean live babies; *and delivering live babies is not what abortion doctors do*." (emphasis added)). Specifically, the panel

majority did not consider that many Wisconsin voters—with a diversity of views on abortion—could have concluded that doctors who regularly engage in a practice that involves killing unborn babies would benefit from additional oversight by hospitals in their communities, lest the nature of their work cause them to drift into Gosnell-like practices.

In dissent, Judge Manion explained that Wisconsin's admitting-privileges law was enacted in response to the crimes committed by abortionist Gosnell. *Id.* at 923–24 (Manion, J., dissenting) ("Dr. Gosnell was able to run his operation in a regulatory vacuum derived in no small part from the view held by some that any regulation upon his practice was a threat to the constitutional rights of his patients."); *accord Van Hollen*, 738 F.3d at 802–03 (Manion, J., concurring). Notably, the sequence of additional abortion regulations responding to horrific acts by abortionists that Judge Manion noted was the same one this Court said helped drive the bans on partial-birth abortions. *See Gonzales*, 550 U.S. at 140–41.

C. The repeated mischaracterizations of Wisconsin's motives for regulating abortion doctors illustrate that motive-based inquiries in this highly contentious area fail to afford "confidence and respect" due to legislatures. *McCray*, 195 U.S. at 55. "[M]any decent and civilized people" who oppose abortion also believe that increased regulations in this area are appropriate and necessary in order to protect patients and the integrity of the medical

profession. *Stenberg*, 530 U.S. at 979 (Kennedy, J., dissenting). And there are also millions of other Americans who support abortion rights but still believe that additional regulation of abortion doctors is necessary to stop "abhorrent" practices such as partial-birth abortion and crimes like those committed by Gosnell. *See Stenberg*, 530 U.S. at 979 (Kennedy, J., dissenting).[6] Many people in both of these groups reasonably believe that abortion doctors are more prone to commit Gosnell-like crimes than doctors engaged in the healing arts.

But the unfortunate fact is that many of those who strongly oppose regulations of abortion doctors characterize any such regulations as driven not by these reasonable public policy views, but by "ignorance" and a lack of "good faith." *Hope Clinic*, 195 F.3d at 879–81 (Posner, C.J., dissenting).

Indeed, for decades now, legislatures that have enacted reasonable abortion regulations have been met with unfair and inaccurate judicial accusations that they were driven by improper motives. This

---

[6] As the grand jurors in the Gosnell investigation explained,

> We ourselves cover a spectrum of personal beliefs about the morality of abortion. For us as a criminal grand jury, however, the case is not about that controversy; it is about disregard of the law and disdain for the lives and health of mothers and infants. We find common ground in exposing what happened here, and in recommending measures to prevent anything like this from ever happening again.

Grand Jury Report at 1.

happened when the States adopted informed-consent laws. *See Thornburgh v. Am. Col. of Obstetricians & Gynecologists*, 476 U.S. 747, 764 (1986), *overruled in part by Casey*, 505 U.S. 833 ("That the Commonwealth does not, and surely would not, compel similar disclosure of every possible peril of necessary surgery or of simple vaccination, reveals the anti-abortion character of the statute and its real purpose."). It occurred when States required that abortions be performed by physicians. *See Armstrong v. Mazurek*, 94 F.3d 566, 568 (9th Cir. 1996), *vacated*, 520 U.S. 968 (1997). It happened when the States and Congress banned partial-birth abortions. *See Hope Clinic*, 195 F.3d at 881–82 (Posner, C.J., dissenting). It is happening now with the reasonable regulations of abortion doctors that Texas, Wisconsin, and other States have enacted in response to Gosnell's crimes. *Schimel*, 806 F.3d at 912. Experience teaches that the *only* way this "dispiriting" practice will stop is if this Court unequivocally forbids it. *Stenberg*, 530 U.S. at 962 (Kennedy, J., dissenting).

II. Analyzing Subjective Legislative Motives For Regulating Abortion Doctors Serves No Constitutional Values

A. The "Very Limited And Well-Defined" Exception Permitting Inquiry Into Legislative Motives Does Not Apply To Regulations Of Abortion Doctors

This Court has permitted analysis of subjective legislative motives "only in the very limited and

well-defined class of cases where the very nature of the constitutional question requires [an inquiry into legislative purpose]." *Omni Outdoor Advert., Inc.*, 499 U.S. at 377 n.6 (citation omitted). This standard is only satisfied for constitutional provisions that prohibit targeting of individuals, *see United States v. Lovett*, 328 U.S. 303, 307 (1946) (Bill of Attainder Clause), or invidious discrimination against racial minorities, *City of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264–71 (1977) (Equal Protection Clause); *Hunt v. Cromartie*, 526 U.S. 541, 546–47 (1999) (same), women, *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648–53 (1975) (same), and religions, *Church of the Lakumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) (opinion of Kennedy, J.) (Establishment Clause).

This "very limited" exception does not apply to Due Process Clause challenges to laws regulating abortion doctors. The Clause prohibits a State from depriving "any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. This language does not suggest the need to ferret out whether legislators were subjectively motivated by their opposition to abortion.

That the Due Process Clause does not require inquiry into legislative motives when analyzing regulations of abortion doctors is further reinforced by the fact that opposition to abortion is not an invidious, constitutionally suspect motive under that Clause. Legislatures have the authority to express a

"preference for normal childbirth" over abortion, *Casey*, 505 U.S. at 872 (joint plurality opinion), and "many decent and civilized people" consider at least some abortions "so abhorrent as to be among the most serious of crimes against human life," *Stenberg*, 530 U.S. at 979 (Kennedy, J., dissenting). It follows that "decent and civilized" opposition to abortion is of a different constitutional character from discrimination against racial minorities, women, or religions. In the case of such invidious motives, the motivations themselves raise serious constitutional concerns. *See City of Arlington Heights*, 429 U.S. at 264–71, *City of Hialeah*, 508 U.S. at 540 (opinion of Kennedy, J.). No such concerns arise in Due Process Clause challenges to regulations of abortion doctors.

Accordingly, even if an inquiry into legislative motives could accurately uncover that some legislators were motivated by "decent and civilized" opposition to abortion, *Stenberg*, 530 U.S. at 979 (Kennedy, J., dissenting); *but see supra* Section I.A, that would be no basis for invalidating a regulation of abortion doctors "that is supported by valid neutral justifications." *Crawford*, 553 U.S. at 204.

B. This Court's Caselaw Protects Access To Abortion Without Inquiry Into Legislative Motives

1. This Court should explicitly prohibit inquiries into legislative motives for regulating abortion doctors for an additional but related reason: such analysis is not necessary in light of this Court's abortion caselaw. This Court in *Gonzales* clarified

that evaluating a law regulating abortion doctors involves a two-step process that vindicates the "balance" between the States' rights to enact reasonable regulations of abortion doctors and women's access to abortion. *See Gonzales*, 550 U.S. at 144–46. Neither step of this analysis requires inquiry into subjective legislative motives.

Under the first step, this Court requires a determination of whether—as a facial matter—the state had a "rational basis to act." *Id.* at 156–60. This is a traditional rational-basis analysis, which does not inquire into the legislature's subjective motivations. *Heller v. Doe*, 509 U.S. 312, 320 (1993). Rather, the proper question is whether there exists an objectively "legitimate" justification for the law—such as "regulating the medical profession"—and whether the legislature has chosen a rational means to advance that interest. *See Gonzales*, 550 U.S. at 158, 167 This analysis gives the legislature "wide discretion" to regulate abortion doctors in the face of "medical and scientific uncertainty." *Id.* at 163 (collecting cases). That is because "[c]onsiderations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends." *Id.* at 166. Indeed, facial invalidation is not appropriate even in the rare situation where "all health evidence contradicts the claim that there is any health basis" for the law. *Mazurek*, 520 U.S. at 973. All that is required is that the regulatory measures "may be helpful" to protecting patients or serving some other

legitimate interest. *See Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 80–81 (1976).

This "rational basis to act" approach to judging facial validity affords to abortion doctors no more—and no less—protection than afforded to other medical professionals. This Court has long held that when the medical profession challenges health and safety regulation under the Due Process Clause, the proper test is rational-basis review, which includes no inquiry into subjective legislative motives. *See, e.g.*, *Williamson v. Lee Optical of Okla. Co.*, 348 U.S. 483, 487–491 (1955); *Barsky v. Bd. of Regents of Univ. of N.Y.*, 347 U.S. 442, 451 (1954); *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997). And because "[t]he State has a legitimate interest in seeing to it that abortion, *like any other medical procedure*, is performed under circumstances that insure maximum safety for the patient," *Roe v. Wade*, 410 U.S. 113, 150 (1973) (emphasis added), the same standard applies to Due Process challenges to regulations of abortion doctors. *See Casey*, 505 U.S. at 885 (joint plurality opinion).

Second, because facially rational regulations of abortion doctors can sometimes undermine women's access to abortion, the Court's caselaw next asks an as-applied question: does the regulation impose an undue burden on access to abortion in "discrete and well-defined instances." *See Gonzales*, 550 U.S. at 167 This inquiry also does not look into subjective legislative motives. Rather, the question is whether, in certain "discrete" cases, the facially valid law

creates a "substantial obstacle" to access to abortion. *Id.* at 156, 167–68. This as-applied "substantial obstacle" inquiry "look[s] to the regulation's effect on the prospective patient, not to the inconvenience the regulation presents to the abortionist." *Schimel*, 806 F.3d at 924 (Manion, J., dissenting). And by focusing on the real-world impact in particular cases, this inquiry does not require analysis of subjective legislative motives.

2. Finally, the fact that this Court in *Casey* used the phrase "purpose or effect" in describing the constitutional analysis, 505 U.S. at 878 (joint plurality opinion), does not suggest that a third, motives-focused inquiry is appropriate. Just five years after *Casey*, this Court in *Mazurek* explained that it was only assuming *arguendo* that improper motives could invalidate an otherwise constitutional regulation of abortion doctors, making clear that it did not view *Casey*'s "purpose or effect" phrase as having decided this issue. *Mazurek*, 520 U.S. at 972.

In *Gonzales*, this Court appeared to jettison inquiry into subjective legislative motives in this area of law, explaining that the "purpose or effect" of a regulation of abortion doctors is "*measured by [the] text.*" 550 U.S. at 156 (emphasis added). This language, combined with this Court's failure to heed the dissent's call for a motives-based inquiry, suggests that the "purpose or effect" analysis contains no subjective element. *Compare id.* at 156–60, *with id.* at 191 (Ginsburg, J., dissenting). This understanding of "purpose" as encompassing

only objective analysis has a long, well-respected lineage. *See, e.g.*, *New York v. Roberts*, 171 U.S. 658, 681 (1898) (Harlan, J., dissenting) ("In a legal sense the object or purpose of legislation is to be determined by its natural and reasonable effect, whatever may have been the motives upon which legislators acted."). Accordingly, the best reading of *Gonzales* is that the Court "simplified *Casey*'s description of an undue burden by collapsing the purpose inquiry into the effects test." *Schimel*, 806 F.3d at 930 (Manion, J., dissenting); *accord Currier*, 760 F.3d at 460 n.4 (Garza, J., dissenting).

Under this proper understanding, a statute does not have the "purpose or effect" of denying access to abortion if it rationally advances objectively "legitimate" interests and does not impose a "substantial obstacle" to such access in "discrete and well-defined instances." *See Gonzales*, 550 U.S. at 157–58, 167. That framework leaves no need for the deeply troubling motives analysis that petitioners urge as their primary argument.

3. Applying this Court's two-part inquiry to regulations of abortion doctors like those that Texas, Wisconsin, and other States recently enacted is straightforward and involves no inquiry into subjective legislative motives. Under this Court's rational-basis approach to Due Process Clause challenges to regulations of the medical profession, those statutes are lawful because they reasonably advance "legitimate" state interests such as protecting patient safety. *Whole Woman's Health v.*

Cole, 790 F.3d 563, 584 (5th Cir. 2015); *Schimel*, 806 F.3d at 935 (Manion, J. dissenting); *Greenville Women's Clinic v. Comm'r, S.C. Dep't of Health & Envtl. Control*, 317 F.3d 357, 363 (4th Cir. 2002) ("These requirements of having admitting privileges at local hospitals and referral arrangements with local experts are so obviously beneficial to patients.") Indeed, if identical requirements were imposed upon any other type of outpatient clinics, there is little question they would be held facially valid under this Court's Due Process Clause caselaw. *See Lee Optical*, 348 U.S. at 487–91; *Barsky*, 347 U.S. at 451; *Glucksberg*, 521 U.S. at 731.

Once the regulations are properly adjudicated facially valid, the only remaining inquiry would be whether those laws impose an undue burden on women in "discrete and well-defined instances." *See Gonzales*, 550 U.S. at 167. This narrow inquiry, of the type the Fifth Circuit carried out below, would not possibly justify facial invalidation. At the very most, under current caselaw, this inquiry would permit the very narrow as-applied remedy of the type the Fifth Circuit crafted in its decision below. *Whole Woman's Health*, 790 F.3d at 591–98; *see generally Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328–29 (2006). The scope of that narrow remedy, if any, would turn upon the burden on access to abortion in specific cases, not upon judicial inquiry into legislative motives.[7]

---

[7] Even if this Court rejects Wisconsin's arguments that motives inquiries are inapplicable to due process challenges to abortion regulations, the State agrees with Respondents that the

CONCLUSION

The judgment of the Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

WISCONSIN DEPARTMENT
OF JUSTICE
17 West Main Street
Madison, WI 53703
tseytlinm@doj.state.wi.us
(608) 267-9323

MISHA TSEYTLIN
Solicitor General
**Counsel of Record*

DANIEL P LENNINGTON
LUKE N. BERG
Deputy Solicitors
General

January 2016

---

challengers here—like the challengers to Wisconsin's admitting-privileges law—have not met the high burden of establishing impermissible legislative intent. Resp'ts' Br. Part III.B.